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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT WADE WHITMAN,

Defendant and Appellant.

E034549

(Super.Ct.No. HEF004866)

**OPINION**

APPEAL from the Superior Court of Riverside County. Mark Ashton Cope,  
Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia,  
Supervising Deputy Attorney General, and David Delgado-Rucci, Deputy Attorney  
General, for Plaintiff and Respondent.

A jury convicted defendant of two counts of attempted voluntary manslaughter under Penal Code sections 664 and 192, subdivision (a). On appeal, defendant contends that his convictions must be reversed because (1) the trial court improperly admitted a detective's testimony regarding defendant's demeanor, and (2) the prosecutor improperly questioned an investigator regarding a witness's reluctance to testify. Moreover, in a supplemental brief, defendant contends that the trial court erred in imposing the upper term on count one and in imposing consecutive sentences for counts one and two, under *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). We affirm the judgment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On December 8, 2001, about 2:30 a.m., Officers Eric Dickson and Mark Richards of the Hemet Police Department responded to a radio call from Officer David Quinn reporting that six to eight shots had been fired in the Acacia area. Both officers were aware that there had been a drive-by shooting the night before in the area of Gilbert and Acacia.

As the officers approached the intersection of Gilbert and Acacia, they turned off their patrol cars' lights. The officers parked near that intersection and proceeded on foot with guns drawn. The officers tried to use the nearby buildings, fences and homes as cover as they searched the area in a semi-crouched position. From the streetlights, they

saw Officer Quinn approaching them from the opposite direction on the other side of the street.

Officers Dickson and Richards eventually reached the 400 block of Acacia where a chain link fence forced the officers to walk further out on the sidewalk. Officer Dickson was now in the lead and the two were facing toward the street with Officer Dickson asking Officer Richards about gang members who had lived across the street. At the time, the officers were passing by the middle of the house at 419 West Acacia, which had no indoor or outdoor lights on. Suddenly, from the left side of the house, the officers heard a male yell, “[F]uck you, mother fuckers,” followed immediately by a gunshot from the house.

Since there was no cover available, the officers started to run back to their patrol cars. About four to five more shots were fired, tracking the officers as they ran along the fence. Officer Dickson was hit by a bullet that went through and down his upper left thigh and lower leg. Officers Richards was hit in the back, which was protected by his bullet-proof vest, by either a bullet or a bit of the chain link fence as a bullet ricocheted off it. Officers Richards and Dickson continued running until they reached a place of safety. Richards then sent out an emergency call for help. The officers also watched the house to ensure that no one left it.

Officer Richards remained at the scene as other officers from several different agencies arrived. Officer Dickson was taken to the hospital, where a bullet was removed from his leg.

Efforts to have the occupants of the house surrender proved futile. Therefore, Officer Richards, who was also a member of the Hemet Police special weapons and tactics (SWAT) team, took part in the removal, via tear gas, of those individuals in the house, including codefendants Paul Wise and Jimmy Valle.

During a subsequent sweep for other suspects, Officer Richards and the other officers found a monitor in the house broadcasting a live picture from a surveillance camera mounted on the front porch roof, along with a microphone. The camera looked out toward the intersection of Gilbert and Acacia, along the same path the officers had used when entering and then walking toward the house.

In addition to the security monitor, the officers found a window with broken glass beneath it and a bullet on the sill. Scattered throughout the house, the officers also found ammunition boxes (one containing hollow-point bullets), several loose bullets, a plastic baggie containing marijuana, a plastic baggie containing methamphetamine, approximately 15 small baggies, and a small scale to used to measure drugs.

Investigation of the chain link fence along which Officers Dickson and Richards had retreated disclosed one bent area with a fresh, shiny “metal transfer” mark on it. This indicated that a bullet may have struck the fence. The damaged fence area was about halfway up the five-foot fence. Two fresh bullet fragments were found in the street in front of the house, and another fresh strike mark was found on a telephone pole across the street.

In the back yard, fresh footprints were discovered leading to a back corner fence area. The chain link fence had fresh dirt on its top railing. Earlier that evening, defendant, a friend of Wise, had been in the house with Wise and others doing drugs. When the officers were later shot at, Alex Espejel (among many others) called 911. Espejel told the dispatcher that he saw someone behind a wall hiding from the police and then saw that person start walking down State Street.

The next day, based on information gathered from various sources, Detective Jeffrey Pinney decided to arrest defendant for his role in the shooting incident. Detective Pinney and other officers had intended to surround the house where defendant was staying when Detective Pinney saw defendant in the driveway. Defendant fled upon seeing the officers but was stopped at gunpoint by another officer covering the house.

Following his arrest, defendant was twice interviewed by Detective Pinney. A videotape of defendant's interviews was played for the jury. Moreover, a transcript of both interviews was provided to the jurors.

When defendant was informed that he faced charges for the attempted murder of a police officer, defendant surprised Detective Pinney by not really reacting to the charges. Instead, defendant simply hung his head said and said, "Okay." After initially denying that he was present in the house, defendant admitted that he was in the bedroom at the time the shots were fired at the officers. Defendant admitted that he had aimed a .380 handgun found in the bedroom at the approaching officers. At another point in the interview, however, defendant denied doing so.

At trial, employees of B.J. Sporting Goods testified that defendant had accompanied Jimmy Valle and/or Paul Wise when they had purchased ammunition on different occasions.

At trial, Investigator Gstrein read portions of a letter sent from defendant while he was in jail in which defendant stated that he blamed his unnamed “co-defendants” for “snitching” on him; that it took the cops three hours to figure out where the shots were coming from; that he had “split” by then, and that the others “should have split too” but were “too fucking stupid.” Defendant continued that he ran when seeing the police the next day but stopped because he figured that he had nothing to worry about. However, he later learned that the police had come for him because the others had “spilled their guts to the pigs.” Defendant then stated that it was his own fault that he was in jail.

Ricky Smith was housed in the same unit with defendant in the Southwest Detention Center. Smith told Investigator Gstrein that defendant had told him that he had fired a .380 handgun at police officers and escaped out the back of the house. Defendant told Smith that he used a sledgehammer to smash the gun and then welded the parts to an engine block. Defendant did not tell Smith where the engine block was located. Smith informed the investigator that he was concerned for his safety should he testify at trial and be labeled a “snitch.” Smith had not received any consideration or promises in exchange for this information.

Smith took the stand at trial. In response to every question from the prosecutor, Smith repeatedly stated that he had nothing to say and that he wanted to go back to

prison. At one point, Smith stated that he had never had any conversations with defendant and denied that defendant had told him anything about the shooting. Smith then reiterated that he had nothing to say. When defense counsel asked several times if he had received any leniency for “testifying,” Smith repeatedly stated, “No.” Smith did testify that he thought talking to Investigator Gstrein and making some statements might get him an “easier” sentence in his own case.

## II

### DISCUSSION

#### A. *Admission of Testimony Regarding Defendant’s Veracity*

Defendant contends that Detective Pinney’s testimony regarding defendant’s veracity during his police interviews was improperly admitted. Specifically, defendant notes that the detective gave “expert” opinion testimony on defendant’s veracity during his police interviews, testimony which was based on the officer’s interpretation of defendant’s body language. Defendant claims that this testimony “invaded the province” of the jury and deprived him of a fair trial. The People argue that defendant has waived this argument. We need not address the waiver argument because defendant’s argument fails on the merits.

In this case, contrary to defendant’s characterization of Detective Pinney’s testimony, the detective did not testify as an expert in demeanor or body language. Instead, the detective did nothing more than what other witnesses are allowed to do -- testify as to the demeanor they personally observed. (See *People v. Lucero* (2000) 23

Cal.4th 692, 732.) Here, Detective Pinney simply testified as to the demeanor he observed during his interviews with defendant. Hence, we can discern no error in admitting Detective Pinney's testimony on this point.

Moreover, we note that the videotape of the police interviews was played to the jury in this case. Hence,-- the jury was able to compare what actually occurred during the interviews with Detective Pinney's testimony,-- which would have aided the jurors determine whether Detective Pinney was testifying truthfully to the events occurring during the interview. Additionally, because the jurors had the opportunity to view the videotape of the interviews, the jury was able to determine and weigh defendant's veracity during his interviews based on their own observations of defendant's behavior, body language, and demeanor during the interviews. (See *People v. Sharp* (1994) 29 Cal.App.4th 1772, 1782 [it is the function of the jury to assess such demeanor evidence and draw its own conclusions about the credibility of the witness in question].)

Furthermore, we note that the prosecutor *never* referred to Detective Pinney's demeanor testimony during her closing argument to establish defendant's guilt. Instead, the prosecutor referred the jury to their own viewing of the videotape in addressing any questions they may have regarding defendant's demeanor or the actual statements made during defendant's police interview. In fact, during the deliberations, the jury requested a "viewback" of the police interview tapes. Thus, any conceivable error in admitting Detective Pinney's observations of defendant's demeanor during his police interviews was harmless. (*People v. Lucero, supra*, 23 Cal.4th at p. 732.)

In sum, Detective Pinney's testimony was proper because he simply testified as to his observation of defendant's demeanor and/or body language during the police interviews. Additionally, the jurors had the opportunity to view the videotapes and determine defendant's demeanor and veracity during the interviews for themselves. There was no error.

B. *Testimony Regarding Informant's Reluctance to Testify*

Defendant contends that the prosecutor improperly elicited, via Investigator Gstrein's testimony, inadmissible evidence that defendant had threatened Ricky Smith into denying any of his previous statements to the investigator. We disagree.

Ricky Smith's interview with Investigator Gstrein, and Smith's testimony at trial, were summarized above. During the trial, Smith was a very reluctant, if not terrified, witness. To explain Smith's reluctance to testify and Smith's denial that he told Investigator Gstrein that defendant had admitted shooting at the officers and then destroying the gun, the prosecutor recalled Investigator Gstrein. The investigator testified that Smith had previously expressed concern that he would be labeled a "snitch" and about what may happen to him in prison once he was so labeled. The investigator, however, testified that *at no time* did Smith tell the investigator that defendant had actually threatened Smith. In response to an inquiry as to why Smith was afraid to testify absent any threats from defendant, the investigator stated that Smith was concerned that defendant *might* be able to get information that Smith had testified against him to where Smith was then incarcerated.

From the above, it is clear that the prosecutor's questioning only sought to clarify the nature of Smith's fear. (*People v. Warren* (1988) 45 Cal.3d 471, 481 [evidence that a witness is afraid to testify is relevant to the credibility of that witness and therefore admissible].) Here, with the investigator's testimony, the prosecutor was able to establish that Smith's anxiety and fear were self induced based on his own self-generated concerns about what *might* happen at being labeled a "snitch" -- and not because defendant had threatened him. Therefore, defendant's claim that the prosecutor presented evidence that defendant had threatened Smith is not supported by the record. Instead, the record shows that the prosecutor elicited evidence to explain Smith's reluctance to testify against defendant.

Therefore, we hold that the prosecutor properly questioned Investigator Gstrein as to the basis of Smith's fear of testifying at trial against defendant.

C. *Upper Term and Consecutive Sentences Under Blakely*

In a supplemental brief, relying on *Blakely, supra*, 542 U.S. \_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403], defendant contends the trial court erred in imposing the upper term of five years six months for attempted voluntary manslaughter on count one. He also contends the court's imposition of consecutive sentences for counts one and two violated *Blakely*.

Penal Code section 193, subdivision (a) provides that voluntary manslaughter is punishable by three, six, or 11 years. Under Penal Code section 664, subdivision (a), the punishment for an attempt to commit a crime that is punishable by a state prison term is

one-half the term for the offense attempted. In imposing the upper term of five years six months for count one, the court found the crime involved violence and great bodily harm. In imposing consecutive sentences for counts one and two, the court found: defendant was an active participant in the crime; he was armed and used a gun; the crime showed planning and a disregard for the well-being of others; defendant was engaged in violent conduct indicating a serious danger to the community; and defendant showed no remorse.

In *Blakely, supra*, 124 S.Ct. 2531, the United States Supreme Court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*): “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi*, at p. 490; *Blakely*, at p. 2536.) In *Blakely*, the court further stated that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]” (*Blakely*, at p. 2537.) It went on to explain: “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Ibid.*)

Penal Code section 1170, subdivision (b) (section 1170(b)) provides in relevant part: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” Defendant contends that, under

*Blakely*, the maximum statutory punishment in this case was the middle term of three years, because that was the most the court could impose pursuant to section 1170(b) based solely on the facts found by the jury, without additional findings of aggravating circumstances. Since the aggravating circumstances on which the court relied to exceed the middle term were neither admitted by defendant nor found true by a jury beyond a reasonable doubt, defendant concludes the imposition of the upper term violated *Blakely*.

1. *Forfeiture*<sup>1</sup>

The People argue that defendant forfeited the right to object to his sentence based on *Blakely*, because he did not object on that basis in the trial court. The right under *Blakely* to have a jury determine any fact used to increase the statutory maximum penalty derives from the Sixth Amendment guarantee of a jury trial in criminal cases. (*Blakely*, *supra*, 124 S.Ct. at p. 2538.) The right to a jury trial is a constitutional protection “of surpassing importance . . . .” (*Apprendi*, *supra*, 530 U.S. at p. 476.)

California courts generally are reluctant to find that a fundamental constitutional right has been forfeited based on the defendant’s failure to assert the right in the trial court. In *People v. Vera* (1997) 15 Cal.4th 269, the California Supreme Court said: “Not

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<sup>1</sup> “[T]he terms ‘waiver’ and ‘forfeiture’ long have been used interchangeably. As the United States Supreme Court has explained, however, ‘[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the “intentional relinquishment or abandonment of a known right.” [Citations.]’ [Citation.]” (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) The People’s argument in this case is a claim of forfeiture. However, as some decisions refer to similar arguments as claims of waiver, we will sometimes use that term in discussing the relevant decisions.

all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]” (*Id.* at p. 276.) The court referred to the “constitutional right to jury trial” as such a right. (*Id.* at p. 277.)

In *People v. Saunders* (1993) 5 Cal.4th 580, the defendant claimed that discharge of the jury that convicted him, and empanelment of a new jury to decide prior conviction allegations, violated the constitutional guarantee against double jeopardy. The California Supreme Court held the defendant did not forfeit that claim by failing to object on that basis in the trial court. The court went on to state: “Defendant’s failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial. [Citations.]” (*Id.* at p. 589, fn. 5.)

At least one California Court of Appeal has held that a failure to object at trial does *not* forfeit a claim of a right to a jury trial under *Apprendi*. In *People v. Belmares* (2003) 106 Cal.App.4th 19, the court, citing *People v. Vera, supra*, 15 Cal.4th 269, held the defendant could argue on appeal that he had a right under *Apprendi* to a jury determination of whether he was the person referred to in documents offered to prove prior convictions. The court *rejected* the People’s contention that the defendant had waived his *Apprendi* claim by failing to object when the trial court instructed the jury that defendant was the person named in the documents: “Since Belmares’s jury trial argument has, in part, a legitimate constitutional basis, we reject as to that argument the Attorney General’s waiver argument.” (*Belmares*, at p. 27.)

The People cite *People v. Marchand* (2002) 98 Cal.App.4th 1056 for the proposition that a defendant waives his right to object on *Apprendi* grounds by failing to object specifically on that ground in the trial court. In *Marchand*, the trial court required the defendant to register as a sex offender under Penal Code section 290, subdivision (a)(2)(E). The court made the necessary predicate findings by a preponderance of the evidence. The defendant claimed his right of due process had been violated because, under *Apprendi*, the predicate facts should have been alleged in the information and found true beyond a reasonable doubt. The Court of Appeal held the defendant waived these claims by not asserting them in the trial court, but it decided to address them anyway because they presented important questions of constitutional law. (*Marchand*, at p. 1061.)

Notably, the defendant in *Marchand* had *expressly* waived his right to a jury trial, so he did *not* assert the trial court had violated that right. (*People v. Marchand, supra*, 98 Cal.App.4th at p. 1059.) The Court of Appeal thus had no occasion to consider whether the defendant could have waived that right by failing to assert it in the trial court. Accordingly, *Marchand* is not particularly helpful in deciding whether a *Blakely* claim -- i.e., a claim that facts used to increase the maximum penalty must be found by a jury -- can be waived by a failure to object on that basis at sentencing.

The People also cite several federal court decisions for the proposition that a constitutional claim may be forfeited. We believe these cases are inapposite.

“ . . . California courts have followed the general rule that when a federal claim is

brought in state court the law of the state controls on matters of practice and procedure but federal law controls on matters of substance. [Citations.]” (*County of Los Angeles v. Superior Court* (2000) 78 Cal.App.4th 212, 230.) The United States Supreme Court likewise has recognized that “it is normally ‘within the power of the State to regulate procedures under which its laws are carried out . . . .’” (*Patterson v. New York* (1977) 432 U.S. 197, 201 [97 S.Ct. 2319, 53 L.Ed.2d 281].) The issue of whether a federal claim has been adequately preserved for appeal in a state court is a procedural matter and therefore should be governed by state law. As discussed *ante*, California case law does not support a finding of forfeiture in this case.

In any event, the federal decisions the People cite fail to persuade us that defendant’s *Blakely* claim should be deemed to be forfeited in this case. *U. S. v. Olano* (1993) 507 U.S. 725 [113 S.Ct. 1770, 123 L.Ed.2d 508] did not concern the constitutional right to a jury trial. *Olano* held the defendant had forfeited a claim that it was error to let alternate jurors attend deliberations by not objecting when the deliberations took place. Significantly for purposes of this case, the Supreme Court expressly recognized that some constitutional rights may not be subject to waiver: “Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake. [Citations.]” (*Id.* at p. 733.)

The court in *U.S. v. Cotton* (2002) 535 U.S. 625 [122 S.Ct. 1781] concluded that an *Apprendi* claim can be forfeited, but the case did not concern the right under *Apprendi* to a jury determination of facts used to increase the maximum punishment. In *Cotton*, the federal district court made drug quantity findings that exposed the defendants to greater punishment, which the court then imposed. On appeal, the defendants argued their sentences were invalid under *Apprendi* because the issue of drug quantity was neither alleged in the indictment nor submitted to the jury.

In holding that the claim had been forfeited, the United States Supreme Court limited its discussion of *Apprendi* to the adequacy of the indictment. It did not discuss whether the defendants waived their *additional* claim that the issue of quantity should have been submitted to the jury. In fact, the court described the question to be addressed as “whether the *omission from a federal indictment* of a fact that enhances the statutory maximum sentence justifies a court of appeals’ vacating the enhanced sentence, even though the defendant did not object in the trial court.” (*U.S. v. Cotton, supra*, 535 U.S. at p. 627, italics added.)

The People argue defendant’s claim that the court violated *Blakely* by relying on sentencing facts that were not found by the jury is essentially a claim that the court considered flawed sentencing factors, which cannot be raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-352.) However, it is apparent from the case *Scott* cited for this proposition that when *Scott* referred to “items contained in a probation

report that were erroneous or otherwise flawed” (*ibid.*), it meant assertions of fact that were not supported by the record. (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725 [defendant could not argue portions of probation report were “without factual basis,” “unsupported,” or “unfounded” where he did not present any evidence to rebut the materials in the report].)

Defendant’s *Blakely* claim does not assert there was no factual support in the record for the court’s sentencing findings. Instead, he claims the court violated the Sixth Amendment by making the findings itself instead of requiring that the jury find them. *Scott* does not support the proposition that this kind of claim is waived by not presenting rebuttal evidence at the sentencing hearing.

Given the importance of the constitutional right to a jury trial, “California law has long required that waiver of a jury trial be express. [Citation.]” (*In re Tahl* (1969) 1 Cal.3d 122, 129, fn. 4.) A reviewing court therefore should not find that a claim based on the right to a jury trial has been *implicitly* forfeited by mere inaction unless there is no substantial doubt about the matter. In view of the decisions discussed, *ante*, we cannot conclude, at least without further guidance, that the California Supreme Court would hold a *Blakely* claim is forfeited by failure to object on that basis in the trial court. Accordingly, we reject the People’s claim of forfeiture.

## 2. *Imposition of upper term*

We turn now to the merits of defendant’s *Blakely* claims. We consider first the claim that *Blakely* precluded imposition of the upper term.

The People assert we need not determine whether *Blakely* prohibits a California court from imposing an upper term based on facts not found by the jury, because both *Apprendi* and *Blakely* recognize that “the fact of a prior conviction” can be found by a judge, even though any *other* fact that increases the maximum statutory penalty for a crime must be found by a jury. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490; *Blakely v. Washington*, *supra*, 124 S.Ct. 2531, 2536.) The People assert that in this case, the court properly relied on defendant’s recidivism as a factor supporting the upper term.

The court did list, at the outset of its sentencing remarks, a number of aggravating circumstances, including the fact that defendant had a prior criminal record and that his crimes were increasing in severity.<sup>2</sup> However, when it came time to apply those circumstances to its sentencing choices, the court *did not* cite recidivism as a factor supporting the upper term. Rather, the court cited that factor in support of its *denial of probation*. When it explained its basis for selecting the upper term, the court cited *only* the fact the crime involved great violence and great bodily harm. That factor plainly did not come within the recidivism exception, and we must consider whether imposing the upper term based on the finding of violence and great bodily harm violated *Blakely*.

The question presented by that issue is this: Under California’s Determinate Sentencing Act (DSA; Pen. Code, § 1170 et seq.) should the “statutory maximum,”

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<sup>2</sup> The People also assert the court properly relied on defendant’s unsatisfactory performance on parole and probation as a recidivism-related aggravating circumstance. We have reviewed the court’s sentencing remarks and have been unable to find any reference to unsatisfactory performance on parole and probation.

which under *Blakely* cannot be exceeded without jury findings, be deemed to be the upper term stated in the statute prescribing the punishment for the crime, or the statutory middle term, which section 1170(b) says shall be given unless the court finds aggravating or mitigating circumstances? Put another way, should the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant” (*Blakely, supra*, 124 S.Ct. at p. 2537, italics omitted) be deemed to be the upper term, on the theory that once a defendant is convicted, he becomes eligible for any of the three terms stated in the penalty statute, or the middle term, on the theory that a conviction alone does not allow the court to find the aggravating circumstances that are necessary to impose the upper term?

*Blakely* does not provide a direct answer to this question. *Blakely* dealt not with an upper term -- i.e., a term at the high end of the range set forth in the statute delineating the punishment for the crime -- but with an “exceptional sentence” (90 months) that *exceeded* the high end of the statutory range of 49 to 53 months. Thus, the sentencing provision declared unconstitutional in *Blakely* operated like an enhancement, not an upper term, under the DSA. Unlike an enhancement in California, the exceptional sentence in *Blakely* could be imposed based on the judge’s unilateral findings of facts, with no jury determination or admission by the defendant of those facts.

Accordingly, to determine how *Blakely* affects the validity of an upper term under the DSA, one must consider the Washington sentencing scheme under which *Blakely*

arose. One must then consider, interpreting *Blakely* in that context, how its holding should be applied to the DSA.<sup>3</sup>

a. *Washington sentencing law*<sup>4</sup>

In Washington, the penalty for a crime that is to be punished with a determinate sentence is determined by computing a “standard range” based on the seriousness of the crime (seriousness level) and the defendant’s prior criminal record (offender score). The seriousness level is determined from a table assigning a number to each crime, which may vary from a low of I for offenses such as forgery to a high of XVI for aggravated first degree murder. (Wash. Rev. Code § 9.94A.515.) The offender score is determined by assigning a point value to each of the defendant’s prior convictions based on its seriousness and then totaling the points for all of the prior convictions. (Wash. Rev. Code § 9.94A.525.)

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<sup>3</sup> The California Supreme Court is currently considering whether an upper term imposed without a jury finding of aggravating circumstances is unconstitutional under *Blakely*. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) In the interim, California Court of Appeal decisions have gone both ways on the issue. To date, all of those decisions either have been accepted for review or are still subject to being reviewed. In view of the Supreme Court’s pending consideration of the issue, it would not be profitable to address the Court of Appeal decisions specifically.

<sup>4</sup> For ease of reference, we use the current versions of the Washington statutes. The Supreme Court in *Blakely* used the versions that were in effect when the defendant in that case was sentenced, October 2000. (*Blakely, supra*, 124 S.Ct. at p. 2534, fn. 1; see *State v. Blakely* (2002) 111 Wash.App. 851, 860 [47 P.3d 149, 154].) The current versions are not different from the versions considered in *Blakely* in any way that would affect our analysis.

The seriousness level and offender score are then applied to the horizontal and vertical axes of a sentencing grid. The intersection of the two numbers on the grid yields a standard range extending from the lowest to the highest term that may be imposed for the offense and a sentencing midpoint between the lowest and highest terms. (Wash. Rev. Code § 9.94A.510, § 9.94A.530.)<sup>5</sup>

Normally, the court is to impose a sentence within the standard range. (Wash. Rev. Code § 9A.04.505(2)(a)(i).) However, the court may impose a sentence outside the range if it finds there are substantial and compelling reasons justifying an “exceptional sentence.” (Wash. Rev. Code § 9.94A.535.) It was this provision, allowing the court to exceed the standard range based on findings it had made independently of the jury, that *Blakely* held violated the Sixth Amendment.

In choosing a sentence within the standard range, a Washington court “shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.” (Wash. Rev. Code § 9.94A.500(1).) Furthermore, the court may rely on

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<sup>5</sup> *Blakely* stated that the defendant in that case had a seriousness level of V and an offender score of two, which made the standard range 13 to 17 months. This was increased to 49 to 53 months, because the defendant also was subject to a firearm enhancement of 36 months. (*Blakely, supra*, 124 S.Ct. at p. 2535.) Although the court did not say so, the midpoint for a 13- to 17-month standard range was 15 months, which  
[footnote continued on next page]

information “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports.” (Wash. Rev. Code § 9.94A.530(2).)

At the sentencing hearing, which the court must conduct before imposing sentence (Wash. Rev. Code § 9.94A.500(1)), each party may argue factual matters in support of a sentence at one or the other end of the standard range. (See, e.g., *State v. Williams* (2000) 103 Wash.App. 231, 238 [11 P.2d 878] [prosecutor argued that protection of the community required a sentence of at least the high end of the standard range].) Thus, “a prosecutor may reference a defendant’s prior bad acts in support of an argument that the sentencing judge should impose the maximum standard range sentence.” (*Ibid.*; accord, *State v. Van Buren* (2000) 101 Wash.App. 206, 216 [2 P.3d 991].)

b. *Interpretation of Blakely in the context of Washington sentencing law*

It is apparent from the foregoing discussion that a Washington judge in selecting a sentence within a 49- to 53-month standard range would *not* literally be imposing a sentence “*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely, supra*, 124 S.Ct. at p. 2537.) Instead, the judge would be imposing a sentence on the basis of the jury verdict or the defendant’s admissions *plus* the information presented in the presentence reports; the statements of counsel, the

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[footnote continued from previous page]

would have yielded a midpoint of 51 months for the 49- to 53-month range. (See Notes foll. Wash. Rev. Code § 9.94A.510.)

defendant, the victim, and the law enforcement officer at the sentencing hearing; and any other information proved at the trial or sentencing hearing. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).)

Requiring a court to consider these sources of information necessarily means the court must be authorized to make factual determinations based on the information. Otherwise, the court could not determine whether the information it is bound by statute to consider is credible or relevant, or whether it supports a sentence at one or the other end of the standard range. It must be presumed that the Washington legislature would not require a court to hold a hearing, consider the evidence presented at the hearing, and then make no meaningful use of the information obtained because it could not make the factual determinations necessary to do so.

Notably, the Washington legislature in enacting the state's determinate sentencing law expressly disclaimed any intent to eliminate judicial discretion from the sentencing process. The legislature stated it wanted to create a sentencing system "which structures, but does not eliminate, discretionary decisions affecting sentences . . . ." (Wash. Rev. Code § 9.94A.110.) A grant of judicial discretion implies the authority to make factual determinations to the degree necessary to reach an informed decision. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered . . . ." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, quoting *People v. Surplice* (1952) 203 Cal.App.2d 784, 791.)

A fair reading of the Washington sentencing law therefore supports the conclusion that a judge in choosing a sentence from a range of 49 to 53 months must have authority to determine facts in addition to those “reflected in the jury verdict or admitted by the defendant.” (*Blakely, supra*, 124 S.Ct. at p. 2537, italics omitted.) A typical jury verdict or guilty plea does no more than establish the defendant’s guilt of the specified offense. That finding would *establish* the range of, say, 49 to 53 months, but it would provide no guidance in *choosing* within the range. Precluding the judge from making any further fact determinations would result in a choice of sentence that would be no more than arbitrary, a result antithetical to the proper exercise of discretion. (*In re Cortez, supra*, 6 Cal.3d at p. 85 [“‘[t]he term [judicial discretion] implies absence of arbitrary determination, capricious disposition or whimsical thinking’”])

The Supreme Court in *Blakely* did not suggest there was any constitutional infirmity in allowing the judge to select a sentence within the 49- to 53-month range. On the contrary, the court made clear that it would have been constitutional for the trial judge to have imposed the high term of 53 months without additional jury findings. As noted, the court defined the “statutory maximum” for *Apprendi* purposes to be “the maximum [the judge] may impose *without* any additional findings.” (*Blakely, supra*, 124 S.Ct. at p. 2537.) The court further made clear that the “statutory maximum” in *Blakely*’s case was the 53-month high term: “In this case, petitioner was sentenced to more than three years above the *53-month statutory maximum* of the standard range because he had acted with ‘deliberate cruelty.’” (*Ibid.*, italics added.)

As a matter of logic, if the “statutory maximum” is the maximum sentence a judge may impose “*without* any additional findings” and the “statutory maximum” for Blakely’s crime was 53 months, it follows that the trial judge in *Blakely* could have imposed 53 months *without* additional jury findings, without violating *Apprendi* or *Blakely*. The constitutional problem arose only when the judge imposed *more* than 53 months without additional jury findings.

The *Blakely* court demonstrated its familiarity with the Washington sentencing statutes by citing them extensively. (*Blakely, supra*, 124 S.Ct. at p. 2535.) It presumably knew those statutes required a court in selecting a sentence within the standard range to consider information *besides* the facts found by the jury or admitted by the defendant. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).) It presumably also recognized that a court could not effectively consider that information if it was precluded from making any further factual determinations.

The *Blakely* court also presumably knew that in many cases, the statutory range available to the sentencing judge would be far greater than the 49- to-53-month range in *Blakely*. For example, in the case of an offender with a seriousness level of XV and an offender score of nine or more, the range would be 411 to 548 months, i.e., 34 years 3 months to 45 years 8 months. (Wash. Rev. Code § 9.94A.510.) Yet, if there is no constitutional infirmity in a judge choosing a sentence within the range of 49 and 53 months without jury findings, then by the same token there should be no infirmity in a judge choosing a sentence within a greater range without such findings. If that is true,

then the conclusion that the judge must be authorized to make factual findings in choosing a sentence within the range becomes virtually inescapable. It cannot reasonably be suggested that a judge could meaningfully choose between 34 years 3 months and 45 years 8 months -- a difference of more than 11 years -- but make no factual findings on which to base the choice.

*Blakely*'s statements that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" and that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings" (*Blakely, supra*, 124 S. Ct. at p. 2537) must be interpreted in this context. That context must include the fact that the court identified no Sixth Amendment violation in the fact a Washington judge could give a sentence of 53 months without jury findings. Viewing the statements in that manner, one can derive these principles of law from *Blakely*:

1. Judicial factfinding in the determination of an appropriate sentence is not per se unconstitutional.
2. Under a determinate sentencing system that provides for a range of sentences rather than a single sentence for a given offense, it is not unconstitutional for the legislature to authorize the judge to make factual determinations that are used to select a sentence within the range, including the highest term in the range.

3. It is unconstitutional for the legislature to authorize the judge to make factual determinations that are used to impose a sentence *exceeding* the highest term of the statutory range. Facts that are used for that purpose must be found by the jury or admitted by the defendant.

We discuss next how these principles should be applied to sentencing in California.

c. *Application of Blakely to California sentencing law*

As noted, section 1170(b) provides: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” Section 1170(b) goes on to provide: “In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer’s report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.”

Section 1170(b)’s description of the materials a judge may consider in deciding whether to impose an upper or lower term is notably similar to the description in Washington’s sentencing law of the materials a judge is to consider in selecting a term within the standard range. As shown *ante*, the Washington law provides that the court shall consider presentence reports; victim impact statements; arguments from counsel, the

defendant, the victim or his or her representative, and an investigative law enforcement officer; and any information proved at trial or at the time of sentencing. (Wash. Rev. Code §§ 9.94A.500(1), 9.94A.530(2).)

As seen *ante*, the Washington system implicitly contemplates a sentencing court may make factual determinations based on its consideration of the materials referred to in the statute. Based on those factual determinations, the court can select any term within the standard sentencing range, including the high term.

California merely makes explicit what is implicit in Washington. Section 1170(b) says the judge can give the upper term by finding aggravating circumstances, and in finding such circumstances can consider the factual materials referred to in the statute. Washington's law implicitly says the same thing -- the judge may sentence within the standard range after considering the factual materials referred to in the Washington statute and, by necessary implication, making fact findings to support a higher or lower sentence within that range. If a 53-month sentence in *Blakely* would not offend the Sixth Amendment, neither should an upper term under the DSA.

The only overt difference between the California and Washington systems is that section 1170(b) contains an explicit directive that the middle term be given unless the judge makes additional findings to justify a departure from it. Defendant seizes upon that directive to argue that under *Blakely*'s statement that the "statutory maximum" for *Apprendi* purposes is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings"

(*Blakely, supra*, 124 S.Ct. at p. 2537), the statutory maximum in California must be deemed to be the middle term, not the upper term.

We believe, however, that *Blakely*'s statement should be understood according to the context in which it was stated -- a case in which the court did not give what would be the equivalent of an upper term under the DSA, but exceeded that term to impose almost double the upper term. We do not for that reason believe that, if it were to consider California's sentencing system, the *Blakely* court would apply its definition literally to find unconstitutional the statutory authority of a court to give the upper term if it finds aggravating circumstances. Rather, we believe, the court would find unconstitutional only a term *exceeding* the upper term without supporting jury findings.

Accordingly, as we read *Blakely*, "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Blakely, supra*, 124 S.Ct. at p. 2537) should be taken to mean the maximum term of the sentencing range the legislature has chosen for that offense. Otherwise, there would have been no basis in *Blakely* for giving any sentence other than 49 months, because the judge would have been precluded from making any factual determination that would justify giving 53 months or any other sentence exceeding 49.

Even if we are wrong, and the *Blakely* court would say that section 1170(b)'s directive renders unconstitutional an upper term imposed without jury findings, the constitutional problem could be instantly eliminated by the simple expedient of deleting the middle term directive from the statute. Then, a sentencing range under the DSA

would become an exact analog of the 49- to 53-month range in *Blakely*, with which, we again emphasize, *Blakely* found no constitutional problem.

Taking that simple expedient would serve no salutary objective that should, in right or in law, justify conferring the imprimatur of constitutionality on a sentence that previously lacked it. The potential for arbitrariness in sentencing would increase, not decrease, because the court could now give an upper or lower term without any factual findings at all. Such a result would in no way advance any Sixth Amendment goal. We cannot believe the *Blakely* court would intend that result.

The only part of the sentence in *Blakely* that the court held presented a constitutional problem was the judge's imposition of an "exceptional" sentence of 90 months. *Blakely* held the judge could not exceed the 49- to 53-month range imposed by the statute that specified the range of punishment for the offense based on his own finding that the defendant acted with deliberate cruelty. The exceptional sentence was based on a separate statute providing for a higher sentence if the court made the cruelty finding.

In this case, the term of five years, six months that defendant received for count one was within the range of terms authorized by the statutes that specified the standard range of punishment for the offense, Penal Code sections 193, subdivision (a) and 664, subdivision (a). The court did not exceed that range by imposing more time under a separate statute, as the judge in *Blakely* did. The term of five years, six months therefore is not analogous to the 90-month term that the court found unconstitutional in *Blakely*.

Rather, it is analogous to the 53-month high end of the standard range in *Blakely*, which the court never suggested might pose any constitutional problem.

The appropriate California analog for the additional 37 months by which the 90-month exceptional sentence in *Blakely* exceeded the 53-month high end of the standard range is a sentence enhancement. An enhancement, like the exceptional sentence in *Blakely*, increases the sentence *beyond* the standard range of lower, middle, and upper terms set forth in the statute specifying the punishment for the offense. Under *Blakely*, a fact used to impose an exceptional sentence must be admitted by the defendant or found to be true by a jury. The same is true of an enhancement in California. (Pen. Code, § 1170.1, subd. (e).)

*Blakely* itself referred to the type of sentence term it determined to be unconstitutional -- one that causes the overall sentence to exceed the statutory maximum -- as an “enhancement.” The court said that a judge in Washington cannot impose an exceptional sentence “without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence *enhancement* or merely *allow* it, the verdict alone does not authorize the sentence.” (*Blakely*, *supra*, 124 S.Ct. at p. 2538, fn. 8, second italics added.)

The court again referred to the excessive portion of an unconstitutional sentence as an “enhancement” when it discussed the appropriate procedure when a defendant pleads guilty: “When a defendant pleads guilty, the State is free to seek judicial *sentence enhancements* so long as the defendant either stipulates to the relevant facts or consents

to judicial factfinding. . . . Even a defendant who stands trial may consent to judicial factfinding as to sentence *enhancements*, which may well be in his interest if relevant evidence would prejudice him at trial.” (*Blakely, supra*, 124 S.Ct. at p. 2541, italics added.)

Though it did not use the term “enhancement,” the *Blakely* court’s comparison of determinate and indeterminate sentencing systems also supports the conclusion that the type of sentence term *Blakely* found unconstitutional is analogous to a California sentence enhancement rather than an upper term. *Blakely* acknowledged that indeterminate sentencing systems “involve judicial factfinding,” since a judge “may implicitly rule on those facts he deems important to the exercise of his sentencing discretion.” (*Blakely, supra*, 124 S.Ct. at p. 2540.) However, the court explained why that kind of judicial factfinding is permissible, but factfinding that yields a penalty exceeding the statutory maximum is not: “In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.” (*Ibid.*)

An upper term under the DSA operates like the 40-year term referred to in the first system described in *Blakely*’s example. An offender, like defendant in this case, who attempts the crime of voluntary manslaughter “knows he is risking” five years, six

months in prison, because Penal Code sections 193, subdivision (a) and Penal Code section 664, subdivision (a), the statutes prescribing the punishment for the offense, say five years, six months is the maximum sentence for that crime. By the same token, a defendant who commits that offense while unarmed is “entitled” to a sentence of no more than five years, six months, since he is not subject to a firearm enhancement. (See Pen. Code, §§ 12022, 12022.5.)

Why, then, are indeterminate sentencing systems constitutional under *Blakely* even though the court acknowledged that they “involve judicial factfinding”? (*Blakely, supra*, 124 S.Ct. at p. 2540.) *Blakely*’s answer is that the judicial factfinding under such a system only permits a judge to “implicitly rule on those facts he deems important to the exercise of his sentencing discretion.” (*Ibid.*) If that is the relevant criterion, an upper term under the DSA should be constitutional too. Findings of aggravating circumstances also consist of a judge ruling “on those facts he deems important to the exercise of his sentencing discretion” within the range set forth in the statute prescribing the punishment. They do not operate to remove the upper term limit and make available a much greater sentence, as the finding of deliberate cruelty did in *Blakely*. That function is served by enhancements, not upper terms.

Decisions of the California Supreme Court also support the conclusion that the type of sentence *Blakely* found unconstitutional is analogous to an enhancement, not an upper term, under the DSA. Although that court has not yet addressed the application of *Blakely* to sentencing under the DSA, it has on several occasions considered the

application of *Apprendi*. The court has consistently read *Apprendi* to apply to enhancements, not to upper terms.

In one recent decision, the court said: “This is what *Apprendi* teaches us: [T]he federal Constitution requires a jury to find, beyond a reasonable doubt, the existence of every element of a *sentence enhancement* that increases the penalty for a crime beyond the ‘prescribed statutory maximum’ punishment for that crime. [Citation.]” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, italics added.)

Two years later, the court made explicit that it considered the “statutory maximum” sentence for *Apprendi* purposes -- the sentence a court cannot exceed without a jury finding -- to be the upper term. The defendant in *In re Varnell* (2003) 30 Cal.4th 1132 received 16 months for violating Health and Safety Code section 11377, subdivision (a), a crime punishable by 16 months, two years, or three years. (Health & Saf. Code, § 11377, subd. (a); Pen. Code, § 18.) The defendant argued the court improperly relied on a prior conviction to find him ineligible for alternative drug offender treatment. Rejecting the argument, the Supreme Court stated: “. . . *Apprendi, supra*, 530 U.S. 466, holds that any fact that increases the penalty for a crime beyond the statutory maximum prescribed for that crime must be submitted to a jury and proved beyond a reasonable doubt. [Citations.] Here, since *the statutory maximum for petitioner’s crime is three years* in prison [citation], no finding by the trial court *increased* the penalty beyond the statutory maximum. [Citation.]” (*Varnell*, at pp. 1141-1142, second italics added.)

If the “statutory maximum” for *Apprendi* purposes is the upper term, the same should be true for purposes of *Blakely*. *Blakely* did not purport to alter any principles expressed in *Apprendi*. The *Blakely* court, in fact, began its legal discussion by saying, “This case requires us to *apply the rule* we expressed in *Apprendi* . . . .” (*Blakely, supra*, 124 S.Ct. at p. 2536, first italics added.) Here, then, the “statutory maximum” for purposes of *Blakely* should be deemed to be the upper term of five years, six months, not the middle term of three years, just as the statutory maximum in *In re Varnell* was the upper term of three years and not the middle term of two years. That being the case, imposition of the upper term does not violate *Blakely*.

### 3. *Consecutive terms*

In addition to the upper term of five years six months on count one, defendant’s sentence included a consecutive term of one year for count two. Defendant contends the consecutive term was unconstitutional under *Blakely*, because the factors the court relied upon to impose consecutive sentencing were not found true by a jury beyond a reasonable doubt or admitted by defendant.

In this case, as stated, the court imposed consecutive sentences based on its findings that defendant was an active participant, he was armed and used a gun, the crime showed planning and disregard of others, defendant was engaged in violent conduct indicating a serious danger to the community, and defendant showed no remorse. The jury made no findings of any of these factors. The issue, therefore, is whether, under

*Apprendi* and *Blakely*, a fact used to impose consecutive sentences must be found by a jury.

Neither *Apprendi* nor *Blakely* addressed that issue. Several post-*Blakely* California Court of Appeal decisions have considered the issue, and the issue is now under review in the Supreme Court. (See, e.g., *People v. Black*, *supra*, review granted July 28, 2004, S126182, and subsequent related cases granted review.) However, as with the issue of the validity of upper terms under *Blakely*, the post-*Blakely* decisions addressing the validity of consecutive sentencing either have been accepted for review or are still subject to being reviewed. There is, however, a decision addressing the issue under *Apprendi*, before *Blakely* was decided.

In *People v. Groves* (2003) 107 Cal.App.4th 1227, the trial court imposed consecutive terms for two counts of forcible oral copulation pursuant to Penal Code section 667.6, based on its finding that the oral copulations occurred on separate occasions. (See California Rules of Court, rule 4.425(a)(1).) The defendant argued “that the imposition of these two consecutive terms without a jury finding that the offenses occurred on separate occasions violated his federal constitutional rights to a jury trial and to due process. [Citations.]” (*Groves*, at p. 1230, fn. omitted.)

The court held the imposition of consecutive terms under Penal Code section 667.6 “does not constitute an increase in the maximum possible sentence.” (*People v. Groves*, *supra*, 107 Cal.App.4th at p. 1231.) Therefore, due process did not require that the finding of separate occasions be made beyond a reasonable doubt, and *Apprendi* did

not require that the finding be made by a jury rather than the trial court. (*Groves*, at pp. 1231-1232.)

*People v. Cleveland* (2001) 87 Cal.App.4th 263, considered a closely analogous issue. The defendant received consecutive sentences for attempted murder and robbery of the same victim. The court refused to stay the robbery sentence under Penal Code section 654, finding that the defendant had separate intents and objectives in committing the robbery and the attempted murder. The defendant argued that under *Apprendi* a jury, not the court, had to determine whether he acted with separate intents and objectives.

The Court of Appeal rejected the argument, holding that the trial court's finding of separate intents and objectives did not *increase* the maximum statutory sentence for either crime. Rather, the finding only determined that the court would impose a separate sentence for each crime *within* the statutory range for that crime. Therefore, the finding did not have to be made by a jury under *Apprendi*. (*People v. Cleveland*, *supra*, 87 Cal.App.4th at pp. 269-271.)

As noted *ante*, the *Blakely* court made clear that its intent was to “apply” the rule it had already expressed in *Apprendi*, not to change it. (*Blakely*, *supra*, 124 S.Ct. at p. 2536.) The holdings of the *Cleveland* and *Groves* courts that the facts on which consecutive or separate terms are based do not have to be found by a jury beyond a reasonable doubt under *Apprendi* therefore apply equally under *Blakely*. Accordingly, *Cleveland* and *Groves* support the rejection of defendant's *Blakely* challenge.

Defendant argues that concurrent sentencing is the presumptive norm unless the sentencing court finds the existence of facts supporting consecutive sentences.

Therefore, he asserts, the relevant statutory maximum sentence for *Apprendi* and *Blakely* purposes is a concurrent sentence, and a court should not be able to exceed that sentence unless facts supporting consecutive sentences have been found by a jury or admitted by the defendant.

The argument fails. There is no statutory provision making concurrent sentencing the presumptive norm. As the court explained in *People v. Reeder* (1984) 152 Cal.App.3d 900: “While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing. [Citations.]” (*Id.* at p. 923.)

#### 4. *Conclusion*

For these reasons, we conclude *Blakely* does not prohibit a California court from imposing an upper term, or from imposing consecutive terms, under the DSA based on facts not found by a jury or admitted by the defendant. Accordingly, sentencing defendant to five years, six months and imposing consecutive terms was not unconstitutional under *Blakely*.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
J.

I concur:

KING  
J.

WARD, J., Concurring and Dissenting:

I concur with the majority's decisions except for its conclusion that the trial court's imposition of the upper term of five years six months on the conviction for attempted voluntary manslaughter did not violate the decision in *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_, 124 S.Ct., 2531 (*Blakely*). I dissent from that conclusion.

In this case, the trial court imposed the upper term of five years six months for attempted voluntary manslaughter conviction based on the court's finding that the crime involved violence and great bodily harm. Under *Blakely*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2536, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) Therefore, the consideration of the fact summarized above to enhance the sentence violates defendant's Sixth Amendment rights; as a result, the sentence is invalid. (*Blakely, supra*, 124 S.Ct. at pp. 2537-2538.)

The majority, however, concludes that "*Blakely* does not prohibit a California court from imposing an upper term, [] under the DSA based on facts not found by a jury or admitted by the defendant." (Maj. opn., *ante*, at p. 38) The

majority opinion is based upon its interpretation of the meaning of “prescribed statutory maximum term.” The Supreme Court refers to that concept in *Apprendi*, *supra*, 530 U.S. 466. There the court said that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi*, *supra*, at p. 490, italics added.) For the following reasons, I believe that the majority has erred in its conclusion as to the meaning of the term “statutory maximum.” As a result, the majority erroneously affirms the trial court decision to aggravate the defendant’s sentence without submitting the issue to a jury.

Penal Code section 1170, subdivision (b) provides that “[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” California Rules of Court, rule 4.420 directs the trial judge to select the middle term of imprisonment unless imposition of the upper term is justified by circumstances in aggravation, established by a preponderance of the evidence. In this case, Penal Code section 193, subdivision (a) provides that voluntary manslaughter is punishable by three, six or eleven years. Under Penal Code section 664, subdivision (a), the punishment for an attempt to commit a crime that is punishable by a state prison term is one-half the term for the offense attempted. Based upon section 1170, subdivision (b), the

majority finds, without apparent authority, that the “statutory maximum” for the conviction of attempted voluntary manslaughter is five years six months (one-half the upper term of eleven years), and that the trial court could impose the aggravated sentence without submitting the issue to a jury.

In *Blakely, supra*, Justice Scalia referred to the admonition of *Apprendi, supra*, that “. . . any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” As Justice Scalia noted “[t]his rule reflects two longstanding tenets of common-law criminal jurisprudence: that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’ 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . .” (*Blakely, supra*, 124 S.Ct. at p. 2536.)

In *Harris v. U.S.* (2002) 536 U.S. 545, 122 S.Ct. 2406, the Supreme Court concluded that the legislature “may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.” (*Id.* at p. 557.) Those constitutional safeguards apply to facts that were “traditional elements” of a crime even though the legislature may label those elements as mere sentencing factors. An element of the crime, which requires submission to a jury, is a fact “legally essential to the

punishment to be inflicted.” (*United States v. Reese* (1875) 92 U.S. 214, 232, 23 L.Ed. 563.)

In this case, the trial court sentenced defendant to the aggravated term based upon its finding by a preponderance of the evidence. The majority nevertheless affirms that decision because it defines the statutory maximum to be the upper term of the three terms authorized by Penal Code section 1170, subdivision (b). That definition, however, ignores Justice Scalia’s caveat that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.” (*Blakely, supra*, 124 S.Ct at p. 2537.)

In this case, the trial court increased the penalty for the charged crime by considering a factor never submitted to a jury. As provided above, the trial court, not the jury, found that the crime involved violence and great bodily harm. As Justice Scalia noted in his concurring opinion in *Apprendi*, the right to trial by jury guarantees “the right to have a jury determine those facts that determine the maximum sentence the law allows.” (*Apprendi, supra*, 530 U.S. at p. 499, 120 S.Ct. 2348.)

Here, the aggravating factor considered by the court in imposing the upper term was neither charged in the information nor found by a jury. Moreover, the People cannot contend that the factor was a mere sentencing factor, and not an element of the crime on which the penalty was based. In *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 243, 118 S.Ct. 1219, Justice Breyer found that recidivism is a traditional sentencing factor not requiring inclusion in the information nor submittal to a jury. That is not the situation here. The involvement of violence and great bodily harm is a factor that goes beyond mere sentencing factors. The trial judge must impose ““a specific sentence *within the* range authorized by the jury’s finding that the defendant [was] guilty.”” (*Harris v. U.S.*, *supra*, 536 U.S. at p. 564, quoting from *Apprendi*, *supra*, at p. 494, n. 19, 120 S.Ct. 2348, original italics.)

The factor found by the trial court to support the aggravated sentence was an element of the crime, not a mere sentencing factor. This factor was not determined by the jury, and hence, it violates the Supreme Court’s admonition “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely*, *supra*, 124 S.Ct at p. 2537.) In effect, the majority’s decision reduces the elements of defendant’s crime to mere sentencing factors, thereby allowing imposition of a substantial increase in the defendant’s sentence. A defendant’s right to a jury decision on the facts relied upon to

aggravate his sentence is too significant to relegate to a mere “sentencing” decision by a trial court relying upon its own finding by a preponderance of the evidence.

I would remand the case for resentencing.

/s/ Ward  
J.